

**JUL 3 2003**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON  
U.S. COURT OF APPEALS**

LU WANG, et al.,

Petitioners,

v.

JOHN ASHCROFT, Attorney General,

Respondent.

No. 02-71230

INS No. A75-678-171/172

MEMORANDUM\*

On Petition for Review of an order of the  
Board of Immigration Appeals.

Argued and Submitted June 6, 2003  
Pasadena, California

Before: TROTT, TALLMAN, Circuit Judges, and COLLINS\*\*, District Judge.

Petitioners Lu Wang and her husband, Xuejun Guan ("Petitioners") petition for review of the Board of Immigration Appeals' ("BIA") dismissal of their appeal from an Immigration Judge's ("IJ") order denying their application for asylum,

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\* Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

withholding deportation, and denying relief under the Convention Against Torture Act. We have jurisdiction pursuant to 8 U.S.C. § 1252(b), and remand for a determination of whether to grant asylum.

This court reviews the BIA's decision that an alien did not establish eligibility for asylum under the substantial evidence standard. Cardenas v. INS, 294 F.3d 1062, 1065 (9th Cir. 2002). The BIA's determination must be upheld if supported by reasonable, substantial, and probative evidence in the record. INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992). Adverse credibility determinations are also reviewed under the substantial evidence standard. Gui v. INS, 280 F.3d 1217, 1225 (9th Cir. 2002). Although the standard is deferential, "[t]he BIA must have a legitimate, articulable basis to question the petitioner's credibility, and must offer a specific, cogent reason for any stated disbelief." Shah v. INS, 220 F.3d 1062, 1067 (9th Cir. 2000)(alteration in original)(citation and internal quotation marks omitted). Because the BIA substantially deferred to the IJ's reasons for its negative credibility finding, we look to the IJ's decision as the basis of the BIA's decision.<sup>1</sup> Garrovillas v. INS, 156 F.3d 1010, 1014 (9th Cir. 1998).

\_\_\_\_ The IJ considered three factors in his adverse credibility finding: 1) inconsistencies between Petitioner Wang's ("Wang") testimony and the

documentary evidence, 2) Petitioner Guan's ("Guan") failure to offer corroborating testimony, and 3) Wang's demeanor while testifying.

A review of Wang's testimony and the documentary evidence present in the record indicates no inconsistency. Wang testified that she requested her first abortion from a hospital in her native country, China, because of extreme pressure from her work supervisor to obtain the abortion. Wang's medical records state only that Wang demanded an abortion; this is not inconsistent with Wang's testimony.

Moreover, the IJ's brief observations regarding Wang's physical demeanor do not support an adverse credibility determination. Wang testified through an interpreter. The transcript of her testimony evidences confusion in the translation of the IJ's questions to Wang and Wang's responses. Consequently, the IJ's observations of Wang's physical demeanor are not substantial evidence of Wang's credibility.

In light of Wang's consistent testimony, translation difficulties, and the IJ's improper consideration of Petitioners' failure to have a child in the United States, Guan's failure to testify is insignificant.

Accordingly, we conclude that the IJ's credibility determination is not supported by substantial evidence. Based on our holding, Petitioners must be

deemed refugees under the Immigration and Nationality Act. 8 U.S.C. § 1101(a)(42). Petitioners are therefore eligible for asylum and an exercise of discretion by the Attorney General. 8 U.S.C. § 1158(b)(1); He v. Ashcroft, 328 F.3d 593, 604 (9th Cir. 2003). We remand for further proceedings to determine whether Petitioners are eligible for withholding of removal. He, 328 F.3d at 604.

PETITION GRANTED, REMANDED.

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